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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-970

Filed 21 May 2024

Hyde County, Nos. 17CRS50135-36

STATE OF NORTH CAROLINA

v.

ALFORNIA LEE ANDERSON, JR., Defendant.

Appeal by defendant from judgments entered 18 October 2021 by Judge Joshua W. Willey Jr. in Superior Court, Hyde County. Heard in the Court of Appeals 19 September 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Kristin J. Uicker, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for defendant-appellant.

STROUD, Judge.

Defendant appeals from judgments, entered following a jury trial, for two counts of second-degree murder. Because the State presented sufficient evidence to show Defendant's sale of heroin was a proximate cause of the victims' deaths, the trial court properly denied his motion to dismiss. The trial court also did not err in

the jury instructions or in failing to intervene *ex mero motu* during the State's closing argument. We conclude there is no error.

I. Background

The State's evidence tended to show that Defendant sold and distributed various illegal drugs, including cocaine and heroin. Tiffany Webber, a friend of Defendant, bought cocaine and heroin from Defendant throughout a period of years. On or about 31 May 2017, Tiffany bought heroin from Defendant for herself three separate times. Tiffany made these purchases from Defendant at the home of Jessica¹, another friend of Defendant. As to 31 May 2017, the first heroin Tiffany bought was brown, but the second and third time the heroin was white, causing Tiffany to question Defendant about the color. Defendant responded to Tiffany that "[i]t's okay. You're going to like it[.]" which Tiffany took to mean the drug was also heroin. Tiffany used some of the white heroin, and she testified the white heroin was "a lot stronger" than the brown heroin.

On a separate occasion on the same day, 31 May 2017, Defendant gave heroin to another friend, Tim, who used the heroin with his friend Kevin. After Kevin used the heroin supplied by Defendant, the drug "put [Kevin] to sleep." Kevin became "white in the face and blue in the lips[.]" and Tim "put him in [a] bathtub full of ice water." Tim thought Kevin was overdosing on the drug. Tim and Defendant took

¹ Pseudonyms are used throughout this opinion.

Kevin to Jessica's house; she testified Defendant was "freaking out" about Kevin's condition. Eventually, Kevin woke up but continued vomiting throughout the night. Jessica testified that Defendant would not let her inject the heroin into her vein with a needle and only allowed her to snort it because "it was too strong."

During the night of 31 May 2017 and the early morning hours of 1 June 2017, Tiffany began a text message exchange with Roger. Roger asked Tiffany to get him a gram of cocaine, and Tiffany called Defendant around 12:00 or 1:00 a.m. Tiffany specifically told Defendant the cocaine was for "the boy from the boat[.]" Initially, Defendant told Tiffany he had no cocaine to sell, but less than an hour later he asked Tiffany to come to a friend's house. Roger went to pick up Tiffany to go buy the cocaine; Roger's girlfriend, Sabrina, was in the car with Roger when he picked up Tiffany. Tiffany went in to buy the cocaine, but Defendant would not sell it to her at that time. After going back and forth via text messages and phone calls, Defendant eventually told Tiffany to meet him at Jessica's house. Roger and Sabrina dropped Tiffany off at Jessica's house.

Defendant told Tiffany the drugs were "on the refrigerator[.]" and Tiffany grabbed a piece of paper with drugs inside and gave Defendant the money Roger had given her. Tiffany testified Defendant did not say anything to her or otherwise warn her the drugs in the paper he had directed her to on the refrigerator were heroin and not cocaine as Roger had requested. Tiffany gave Roger the drugs, and Roger dropped Tiffany off at her house.

The next day, 1 June 2017, Cathy, Roger's sister, arrived at Roger's house around 4:00 to 5:00 pm. Cathy stated she found Roger and Sabrina and Sabrina looked as if she "had been standing at the end of the bar and just, like, fell over and [Roger] had been sitting on the other side of the bar on a stool because his legs were still stuck in the stool." Cathy testified Sabrina was cold to the touch and as far as she could tell, neither Sabrina nor Roger was breathing. Cathy called 911 and noticed "there was, like, lines cut out of the drugs" on the kitchen counter.

Laboratory analysis confirmed the substance found in the piece of paper at the scene where Roger and Sabrina were found contained heroin and fentanyl. Upon Roger's death, he had alcohol, nicotine, "cocaine metabolite," "fentanyl, and a low dose of morphine" in his system. The same substances were found in Sabrina's toxicology report as reported in Roger's report. The autopsy reports stated Roger's cause of death was due to "combined heroin, fentanyl, cocaine, and ethanol toxicity[.]" and Sabrina's cause of death was combined "fentanyl and cocaine and ethanol." However, the medical examiner testified that "fentanyl [was] the main player" in the deaths of both Roger and Sabrina.

Defendant did not testify at trial nor present any other evidence. Defendant made a motion to dismiss at the close of the State's evidence and renewed the motion at the end of all evidence, stating

[w]e would like to renew our motion to dismiss the two counts of second degree murder in 17 CRS 50135, 50136, and we would offer that the State failed to prove ingestion

of the substance and the proximate cause of death of the users of the opiate that was unlawfully distributed allegedly by [Defendant].

The judge denied the motion.

During closing arguments, the State showed the jury a map of Hyde County and asked “[d]o you want Hyde County to send a message to the peddlers of this poison? You come to Hyde County, you distribute these drugs, if people die, you are going to pay.” The trial court stated during the charge conference it would instruct on second-degree murder caused by a controlled substance. Defendant did not object or request any further jury instructions.

The jury found Defendant guilty of both counts of second-degree murder. On or about 18 October 2021, the trial court entered judgment against Defendant. Defendant gave oral notice of appeal in open court.

II. Motion to Dismiss

Defendant first contends that “the trial court erred by denying [Defendant’s] motion to dismiss.” (Capitalization altered.) Specifically, Defendant contends the State did not prove “his sale of drugs to Tiffany proximately caused” the deaths of Roger and Sabrina and “Tiffany’s actions were a superseding cause of [Roger] and [Sabrina’s] deaths which broke the chain of causation.”

The standard of review for a motion to dismiss in a criminal case is

whether substantial evidence was introduced of each element of the offense charged and that the defendant was the perpetrator. Substantial evidence is such relevant

evidence as a reasonable mind might accept as adequate to support a conclusion. The court is to consider the evidence in the light most favorable to the State in ruling on a motion to dismiss. The State is entitled to every reasonable intendment and inference to be drawn from the evidence; contradictions and discrepancies do not warrant dismissal—they are for the jury to resolve.

State v. Williamson, 283 N.C. App. 91, 94-95, 872 S.E.2d 388, 392 (2022) (citation and ellipsis omitted). In North Carolina, second-degree murder is defined as “(1) the unlawful killing, (2) of another human being, (3) with malice, but (4) without premeditation and deliberation.” *Id.* at 95, 872 S.E.2d at 392 (citation, quotation marks, and emphasis omitted). Second-degree murder by controlled substance is defined as a murder “that was proximately caused by the unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation of opium, or cocaine or other substance described in G.S. 90-90(1)d., or methamphetamine, and the ingestion of such substance caused the death of the user.” N.C. Gen. Stat. § 14-17(b)(2) (2017).² As to proximate cause, this Court has stated

[t]he act of the accused need not be the immediate cause of death. He is legally accountable if the direct cause is the natural result of the criminal act. There may be more than one proximate cause and criminal responsibility arises when the act complained of caused or directly contributed to the death.

State v. Parlee, 209 N.C. App. 144, 148, 703 S.E.2d 866, 870 (2011) (citations omitted).

² North Carolina General Statute Section 14-17(b)(2) was effective in 2017, at the time of the offense, but a new version of the statute is effective as of 1 December 2023. See N.C. Gen. Stat. § 14-18.4 (2023).

In *Parlee*, the defendant sold two friends an Oxymorphone pill which the two friends split in half and ingested later that night. *Id.* at 145, 703 S.E.2d at 868. One of the friends, Matt, was found deceased the next morning and his “cause of death was an acute Oxymorphone overdose.” *Id.* at 146, 703 S.E.2d at 869. The defendant was charged and convicted of second-degree murder. *Id.* This Court reviewed whether the trial court erred in denying the defendant’s motion to dismiss since, according to the defendant, the State could not prove malice or proximate cause. *Id.* at 147, 703 S.E.2d at 869. As to malice, this Court determined “that in the light most favorable to the State, the jury could have reasonably inferred from the evidence presented that [the] defendant knew Oxymorphone was an inherently dangerous drug and acted with malice when he supplied [the two friends] with the Oxymorphone pill.” *Id.* at 148, 703 S.E.2d at 870. Finally, as to proximate cause, this Court determined “the evidence was sufficient to submit to the jury the question of whether the act of [the] defendant selling [the two friends] the Oxymorphone pill was a proximate cause of Matt’s death.” *Id.* at 149, 703 S.E.2d at 870.

Defendant contends this case is distinguishable from *Parlee* since here Defendant “had no direct interaction” with Roger or Sabrina and he only sold the drugs to Tiffany and “Tiffany’s decision to take drugs from [Defendant] that she knew were not cocaine and to then give them to [Roger] and [Sabrina] while actively representing that the drugs were cocaine was an intervening act.” This argument is unconvincing. First, like the defendant in *Parlee*, Defendant knew the drugs he was

selling were “inherently dangerous[.]” *Id.* at 148, 703 S.E.2d at 870. Further, Defendant knew the drugs he had in his possession for sale were extremely dangerous since, on the same night Roger and Sabrina died, Defendant was present while a friend overdosed on the heroin Defendant was selling. Defendant even forbade his friend Jessica from injecting it because “it was too strong.”

Second, and more important as to proximate cause, Defendant had direct knowledge that he was selling drugs to somebody else through Tiffany since Tiffany told him “the boy from the boat” wanted to buy cocaine. Defendant was aware Roger, whom Defendant knew as “the boy from the boat,” wanted to buy cocaine, not heroin or fentanyl. But despite the request for cocaine, Defendant gave Tiffany heroin to give to Roger without telling Tiffany it was heroin. Even if Tiffany also knew the drug was heroin, due to her own use of the drugs from Defendant that day, this does not absolve Defendant of responsibility since he knowingly gave Tiffany an inherently dangerous drug to provide to another person. Both Defendant’s and Tiffany’s actions can be a proximate cause of Roger’s and Sabrina’s death. *See id.* (“There may be more than one proximate cause and criminal responsibility arises when the act complained of caused or directly contributed to the death.”).

Therefore, we conclude there was substantial evidence that Defendant’s sale of the drugs was a proximate cause of the deaths of Roger and Sabrina. *See id.* at 149, 703 S.E.2d at 870. Further, for the same reasons as the Court stated in *Parlee*, Defendant acted with malice since he knowingly sold an inherently dangerous drug

to the victims. *Id.* at 148, 703 S.E.2d at 870. The trial court did not err by denying Defendant's motion to dismiss.

III. Jury Instructions

Defendant makes two arguments as to jury instructions: (1) "the trial court plainly erred by not instructing the jury on intervening acts of others[:]" and (2) "the trial court plainly erred by not instructing on the lesser included offense of involuntary manslaughter when the evidence of malice was in conflict."

As Defendant recognizes, since he did not object at trial to the jury instructions given by the trial court and he did not request any of the instructions argued on appeal, his challenge is reviewed for plain error. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) ("Because [the] defendant did not object at trial, we review for plain error.").

The plain error rule is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where the error is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

Id. at 516-17, 723 S.E.2d at 333 (emphasis in original) (citations, quotation marks, and brackets omitted). Thus, both of Defendant's arguments as to jury instructions

are reviewed for plain error.

A. Intervening Acts

First, Defendant argues “the trial court plainly erred by not instructing the jury on intervening acts of others.” (Capitalization altered.) Defendant recognizes the trial court gave an instruction defining proximate cause. However, Defendant contends “[t]he jury probably would have acquitted [Defendant] had they been instructed on intervening cause.” As this Court has previously noted,

[t]o escape responsibility based on an intervening or superseding cause, the defendant must show that the intervening or superseding act was the sole cause of death. An intervening or superseding cause is a cause that so entirely intervenes in or supersedes the operation of the defendant’s negligence that it alone, without his negligence contributing thereto in the slightest degree, produces the injury.

State v. Bethea, 167 N.C. App. 215, 222, 605 S.E.2d 173, 179 (2004) (citations, quotation marks, and brackets omitted).

As stated above in our discussion of proximate cause in the context of Defendant’s motion to dismiss, Defendant was aware he was selling drugs to Tiffany for the purpose of selling to Roger. Defendant does not argue that he did not sell the drugs at all. It is clear the drugs Defendant provided to Tiffany, for the purpose of providing to Roger, caused the deaths of Roger and Sabrina, as the medical examiner testified. Defendant also argues Roger and Sabrina “intentionally took the drugs that night” as if that would somehow absolve him of any responsibility for being the

supplier of the drugs. Defendant has not noted any evidence which would support an instruction as to any act “that so entirely [intervenes in or] supersedes the operation of the defendant’s negligence that it alone, without his negligence contributing thereto in the slightest degree, produces the injury.” *Id.* Therefore, the trial court did not err, much less plainly err, by not giving an instruction on intervening acts. This argument is overruled.

B. Involuntary Manslaughter

Next, Defendant argues “the trial court plainly erred by not instructing on the lesser included offense of involuntary manslaughter when the evidence of malice was in conflict.” (Capitalization altered.) Again, this argument is reviewed for plain error since Defendant did not request an involuntary manslaughter instruction. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

“A judge presiding over a jury trial must instruct the jury as to a lesser included offense of the crime charged where there is evidence from which the jury could reasonably conclude that the defendant committed the lesser included offense.” *State v. Debiase*, 211 N.C. App. 497, 504, 711 S.E.2d 436, 441 (2011). Involuntary manslaughter is “a lesser included offense of second degree murder, [and] is the unlawful killing of a human being *without malice*, without premeditation and deliberation, and without intention to kill or inflict serious bodily injury.” *State v. Brichikov*, 281 N.C. App. 408, 418, 869 S.E.2d 339, 346 (2022) (emphasis in original) (citation and quotation marks omitted). Involuntary manslaughter can also be

defined as “the unintentional killing of a human being *without malice*, proximately caused by (1) an unlawful act not amounting to a felony nor naturally dangerous to human life, or (2) a culpably negligent act or omission.” *Id.* (emphasis in original) (citation and quotation marks omitted). Finally, malice

means not only hatred, ill will, or spite, but also that condition of mind which prompts a person to take the life of another intentionally, without just cause, excuse, or justification, or to wantonly act in such a manner as to manifest depravity of mind, a heart devoid of a sense of social duty, and a callous disregard for human life.

Id. at 417, 869 S.E.2d at 346 (citation omitted).

Defendant mostly argues that his actions would support a conviction of involuntary manslaughter instead of second-degree murder, but, as Defendant did not object at trial nor request an involuntary manslaughter instruction, Defendant must show the instruction would have “had a probable impact on the jury’s finding that the defendant was guilty.” *Lawrence*, 365 N.C. at 516-17, 723 SE.2d at 333. Defendant argues that the jury “probably would have returned a different verdict” if instructed on involuntary manslaughter since “the jury would probably have found [Defendant] acted recklessly when selling drugs, but not to the level required to show the malice needed for second-degree murder.”

Nonetheless, Defendant cannot show there is a conflict in the evidence regarding the element of malice. First, Defendant watched one of his friends overdose on the heroin Defendant supplied the friend earlier the same night he sold the drugs

to Tiffany for Roger and Sabrina. Also, Defendant forbade another friend, whom he knew to be a regular user of heroin and would thus have a higher tolerance for the drug, from injecting the drug because “it was too strong.” Further, Defendant knew Roger, known to Defendant as “the boy from the boat,” was seeking cocaine, not heroin or fentanyl. But despite this knowledge, Defendant sold heroin to Tiffany and did not warn Tiffany it was heroin and not cocaine; Defendant simply knowingly sold heroin to someone seeking cocaine even after watching a friend overdose prior that night on the heroin Defendant supplied and which Defendant forbade his other friend from injecting since “it was too strong.” Taking these facts together, the evidence shows Defendant acted with malice to such a degree that it rose to the level of second-degree murder, and Defendant cannot demonstrate error, much less plain error. *Brichikov*, 281 N.C. App. at 417, 869 S.E.2d at 346 (citation omitted). This argument is overruled.

IV. State’s Closing Argument

Finally, Defendant argues “the trial court erred by failing to intervene in the State’s closing argument about sending a message to other ‘peddlers of this poison.’” Defendant contends “[t]his type of general deterrence argument is improper, and the trial court should have stepped in to stop it.”

The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*. In other words,

the reviewing court must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord.

State v. Huey, 370 N.C. 174, 179, 804 S.E.2d 464, 469 (2017) (citations omitted). Our Supreme Court has laid out a two-step analysis in deciding whether the trial court should have intervened: “(1) whether the argument was improper; and, if so, (2) whether the argument was so grossly improper as to impede the defendant’s right to a fair trial.” *Id.* (citation omitted). Finally, “[o]nly when it finds both an improper argument and prejudice will this Court conclude that the error merits appropriate relief.” *Id.* (citation omitted).

Generally, “prosecutors are given wide latitude in the scope of their argument and may argue to the jury the law, the facts in evidence, and all reasonable inferences drawn therefrom.” *Id.* at 180, 804 S.E.2d at 469 (citation omitted). For Defendant to get a new trial, he must show “the prosecutors’ comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Id.* at 180, 804 S.E.2d at 470.

Here, the prosecutor held up a map of Hyde County and stated,

By your verdict what do your - - what do you want your county to be? Do you want Hyde County to be known that the kingpin, the dealer, is untouchable just because maybe he didn’t deliver the drugs to [Roger] and [Sabrina]? Do you want - - do you want Hyde County to be known as that? As long as I’ve got a middle person in between me, I’m safe. Do you want Hyde County to be known as a place where all

the responsibility is on the user? Are you going to say to yourself and to your fellow citizens in Hyde County that, hey, if you do the drugs, that's on you? It's not on me. You made that choice. Do you want Hyde County to be known as that kind of place, or do you want to do something about it? Do you want Hyde County to send a message to the peddlers of this poison? You come to Hyde County, you distribute these drugs, if people die, you are going to pay. You're going to be held accountable for your actions.

Even if this argument was improper, it does not rise to the level of impropriety where “the prosecutors’ comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Id.* This Court has determined many times that similar arguments involving community sentiment were not so grossly improper as to require a new trial. *See, e.g., State v. Boyd*, 311 N.C. 408, 417-18, 319 S.E.2d 189, 196-97 (1984) (determining the prosecutor’s closing argument saying “[w]hat will you say to the people in this Country about what you have heard? What will you say about all those citizens out there in Surry County about what you have heard here this week? Will you say, Okay, if it happened down there at Mayberry Mall on a Saturday? Will you say Okay?” was not grossly improper to require a new trial (citation and quotation marks omitted)); *see, e.g., also State v. Golphin*, 352 N.C. 364, 471, 533 S.E.2d 168, 237 (2000) (determining the prosecutor’s closing argument stating “[s]omeone has got to stand up and tell defendants like this, We are not gonna tolerate this. We cannot tolerate this. What does a life sentence to these two defendants *send* as a message to the citizens of this state?” did not require a new trial (emphasis in original)). Thus, this argument is overruled.

V. Conclusion

The trial court did not err in denying Defendant's motion to dismiss, by not instructing the jury on intervening causes or involuntary manslaughter, or not intervening *ex mero motu* during the State's closing argument. Thus, we find no error.

NO ERROR.

Judges MURPHY and FLOOD concur.

Report per Rule 30(e).